



August 15, 2001

Mr. James W. Deatherage
Jim Deatherage & Associates, P.C.
Wells Fargo Tower
800 West Airport Freeway
Suite 518, LB 6060
Irving, Texas 75062

OR2001-3600

Dear Mr. Deatherage:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150760.

The Irving Independent School District ("IISD"), which you represent, received a request for copies of all statements or reports regarding IISD's investigations of the requestor's son. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered the comments submitted to this office by the requestor and by a former IISD employee. See Gov't Code § 552.304, .305(a), (b).

Initially, we note that most of the submitted information consists of student education records which are subject to the Family Educational Rights and Privacy Act ("FERPA"). See 20 U.S.C. § 1232g(b)(1). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, *unless otherwise authorized by the student's parent*. "Education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. See 20 U.S.C. § 1232g(a)(4)(A). Section 552.114(a) of the Government Code requires that an educational agency withhold "information in a student record at an educational institution funded wholly or partly by state revenue." Further, section 552.026 provides that "chapter [552] does not require the release of information contained in education records of an educational agency or institution, except in conformity with [FERPA]." This office generally applies the same analysis under section 552.114 and FERPA.

Further, FERPA provides that “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, *the right to inspect and review the education records of their children.*” 20 U.S.C. § 1232g(a)(1)(A) (emphasis added). You argue that the submitted information is excepted from public disclosure under section 552.103 of the Government Code. Generally, exceptions to disclosure under the Public Information Act do not apply to a student’s or parent’s request for educational records pursuant to FERPA. See Open Records Decision No. 431 (1985) (finding that predecessor to section 552.103 does not apply to a student’s request for his own records). Thus, we conclude that you must release the education records concerning the requestor’s child to the requestor. In addition, some of the responsive information contains personally identifying references to students other than the requestor’s child. To the extent that this information directly identifies other students, *or makes other students’ identities easily traceable*, it must be withheld pursuant to FERPA. See 45 C.F.R. § 99.3; Open Records Decision No. 165 (1977). We have marked those references which directly identify other students for your convenience.¹

The file contains a few documents that are not the education records of the requestor’s child. We next address your claim under section 552.103 for this information. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.–Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.–Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov’t Code § 552.103(c).

In order to establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete

¹Questions about FERPA can be directed to the Family Policy Compliance Office of the U. S. Department of Education at (202) 260-3887.

evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You inform us that the requestor has demanded that IISD pay for certain medical bills. In addition, you state that an attorney has represented the requestor in education planning and school admission policy meetings, and that the requestor and her counsel have sent written questions to an IISD employee concerning events involving the requestor's son. You also inform us that the Texas Department of Protective and Regulatory Services ("TDPRS") is conducting an investigation of alleged abuse involving the requestor's son. Consequently, you contend that civil or criminal litigation can reasonably be anticipated from the totality of the circumstances. However, you state that IISD has received no official word that the ongoing TDPRS investigation has concluded, and you have submitted no communications containing a threat to sue from the requestor or any other potential opposing party. After reviewing your arguments, we conclude that you have not demonstrated that a potential opposing party has taken any concrete steps toward either criminal or civil litigation. Therefore, you have not demonstrated that the district reasonably anticipates litigation. Accordingly, you may not withhold the remaining submitted information under section 552.103 of the Government Code.

Although you do not raise section 552.101 or common law privacy, you have informed a former IISD employee of this request, and she has sent commentary to this office for consideration. See Gov't Code § 552.305(a), (b). She objects to public disclosure of the information at issue, and requests that the information be kept confidential. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). However, the scope of public employee privacy is narrow. Open Records Decision No. 423 at 2 (1984). Because the work behavior of a public employee and the conditions for his or her continued employment are matters of legitimate public interest, the common law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about the employee's performance. See Open Records Decision No. 438 (1986). Similarly,

information about a public employee's qualifications, disciplinary action and background is not protected by common law privacy. *See* Open Records Decision No. 444 (1986). The submitted information does contain some types of information that this office has found to be excepted from required public disclosure under common law privacy. *See Industrial Found., v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (psychiatric treatment of mental disorders); Open Records Decision No. 455 (1987) (prescription drugs, illnesses). Because the requestor in this case is a parent of the child about whom the information concerns, such information may not be withheld under the common law right of privacy. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access to information held by governmental body relating to that person and protected from public disclosure by laws intended to protect that person's privacy rights). Moreover, information that is subject to the Public Information may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found.*, 540 S.W.2d 668, 676-78. Accordingly, the information at issue may not be withheld under section 552.101 and common law privacy.

Section 552.101 also encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

You inform us that the information at issue relates to allegations of child abuse that are currently being investigated under chapter 261 of the Family Code. However, the submitted documents were part of an investigation conducted by IISD's principal, and not by IISD's police department. Thus, there is no clear indication that any of the information was *used or developed* in an investigation under section 261.201 of the Family Code. *See id.* § 261.201(a)(2). Accordingly, to the extent that IISD has provided the submitted information for purposes of an investigation conducted under section 261.201 of the Family Code, IISD must withhold those documents in their entirety from disclosure under section 552.101 of the Government Code as information made confidential by section 261.201. If the submitted information was not used in such an investigation, then it may not be withheld under section 552.101.

In summary, IISD must withhold from public disclosure the information that we have marked under FERPA. To the extent that any of the submitted information has been used in an investigation under chapter 261 of the Family Code, the information must be withheld under section 552.101 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

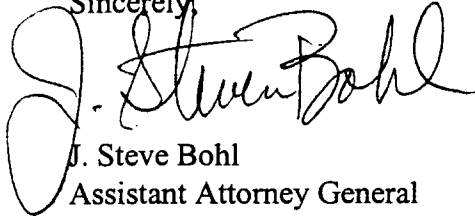
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Steve Bohl". The signature is fluid and cursive, with the first name "J." and last name "Bohl" clearly distinguishable.

J. Steve Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 150760

Enc: Marked documents

c: Ms. Tracy Williams
310 Christine Ct.
Irving, Texas 75060
(w/o enclosures)